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ABSTRACT

This paper argues that courts have tended to identify and enforce individual rights at the expense, in many instances, of the ability of school boards and legislatures to carry out what they perceive to be the will of the majority of voters in their jurisdictions. The trend emphasizing individual rights began in 1954 with the Supreme Court decision in "Brown v. Board of Education" that upheld the rights of minorities over the will of the majority with respect to school segregation. Other pivotal Supreme Court decisions and acts of Congress that furthered this trend are discussed, including the Civil Rights Act of 1964; "Pickering v. Board of Education" (free speech for teachers on issues of public interest); "Tinker v. Board of Education" (students' right to nondisruptive free expression), legislation against discrimination on the basis of sex or handicap; and two 1975 Supreme Court decisions protecting students' constitutional rights against school boards. Starting in the mid-1970's, however, the Supreme Court shifted toward a position more supportive of the rights of elected officials to act in the best interests of the majority. Supreme Court decisions indicative of this trend are discussed, including limitations on procedural due process rights, a shift in burden of proof to the plaintiff in discrimination cases, and other cases supporting school officials' prerogatives over individual rights. The paper concludes by warning that school officials should not abuse their newfound judicial support. (TE)

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WHO RUNS THE SCHOOLS: JUDGES OR EDUCATORS?

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Education, like many other aspects of American life, has been through a period where legislatures, courts, and governmental agencies have emphasized the rights of individuals and have dramatically curtailed the ability of elected officials to carry out policies and practices they believe reflect the will of the majority of the voters. This tension between the rights of individuals and the will of the majority has been with us since the United States Constitution was considered for ratification. The original Constitution contained seven articles describing the power of elected and appointed officials of the Federal Government. When the Constitution was considered for ratification by the States, some States balked because the Constitution did not contain a delineation of the rights of individuals. Therefore, a Bill of Rights was drafted and added to the Constitution as the first ten amendments.[1] As a result, for example, individuals in the United States have rights to freedom in speech and religion and to be free from unreasonable searches and seizures and from compelled self-incrimination. Individuals possess these and other rights under the Bill of Rights even though the majority of voters in a particular jurisdiction would seek to curtail such rights.

The balancing of individual rights and the will of the majority has occupied a good share of attention from the courts in the last 200 years.

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Indeed, most constitutional cases decided by the Supreme Court involve situations where elected or appointed officials attempt to carry out policies which, it is alleged, conflict with the rights of individuals. The whole area of free speech, for example, involves an extremely difficult balance between society's desire to be free from provocative or obscene speech and the rights of individuals to engage in a dialogue on matters of public interest. No absolute solutions have been developed and, it is safe to say, no final solutions to these difficult issues will ever be established.

It is in this context of the balance between the will of the majority and the rights of individuals that we should examine legal events in education over the past twenty-five to thirty years. It is the view of this observer that beginning in the 1950s and running through the mid-1970s, we witnessed a series of events which identified and enforced individual rights at the expense, in many instances, of the ability of school boards and legislatures to carry out what they perceived to be the will of the majority of voters in their jurisdictions. In many instances, the reforms were long overdue; in others, the timeliness of the actions can be questioned.

The trend emphasizing individual rights began, in the judgment of this observer, in 1954 when the Supreme Court in Brown v. Board of Education of Topeka, Kansas decided that it was a violation of the Equal Protection Clause of the Fourteenth Amendment to separate children on the basis of race in the schools.[2] Thus, the ability of state legislatures and school boards in those southern and border states to carry out what they thought was the will of the majority of voters was curtailed in the interest of the

rights of individual students to be free from discrimination in their educational programs.

The emphasis on individual rights was furthered in 1964 when Congress passed the Civil Rights Act.[3] Among the provisions of that law were Title VI banning discrimination on the basis of race, color and national origin in programs or activities receiving federal funding and Title VII which outlawed discrimination on the basis of race, color, national origin, and religion in private sector employment decisions.

The Supreme Court got back into the act in 1968 when it decided Pickering v. Board of Education holding that public school teachers have the right to engage in free speech activities regarding issues of public interest.[4] Mr. Pickering, a public school teacher, had written a letter to the editor of the local newspaper criticizing the way in which the school board handled a bond issue and the athletic budget. He was terminated by the school board but reinstated following the Court's ruling that teachers had the same free speech rights as other citizens, with some minor exceptions. A year later, in Tinker v. Board of Education, the Supreme Court held that public school students have the constitutional right to engage in nondisruptive symbolic speech inside the school building.[5] Prior to Tinker, it was generally assumed that students relinquished their constitutional rights when entering the schoolhouse. In Tinker, several students were suspended for wearing black arm bands to protest the Vietnam War. The Supreme Court held that students could not be punished for engaging in free speech activities unless they caused actual disruption or unless the school officials could forecast that the free speech activity would lead to substantial disruption to the educational process.

Congress reentered the picture in 1972 with two actions. First, it passed Title IX of the Education Amendments which prohibited discrimination on the basis of sex in any education program or activity receiving federal educational funding.[6] Second, it amended Title VII of the Civil Rights Act to include sex discrimination as a prohibited employment practice and extended the coverage of the Act from just the private sector to states and political subdivisions of the states such as municipalities and school boards.[7] Thus for the first time the employment practices of school boards became subject to the federal law prohibiting employment decisions on the basis of race, color, national origin, religion, and sex.

This was followed in 1973 by the passage of Section 504 of the Rehabilitation Act which prohibited discrimination on the basis of handicap in programs receiving federal financial assistance.[8] In 1974, Congress passed the Family Educational Rights and Privacy Act, commonly known as the Buckley Amendment, mandating sweeping changes in the student recordkeeping practices of most schools and colleges.[9]

In early 1975, the Supreme Court decided two cases on the same day which probably represented the apex of the emphasis on individual rights in education. In one case, Goss v. Lopez, the Court held on a 5-4 vote that public school students were entitled to procedural due process prior to even short-term suspensions.[10] In a companion case, Wood v. Strickland, the Court held that school board members could be sued personally for money damages if they knew or should have known that actions taken against students violated the students' constitutional rights.[11] Thus, on the same day, the Supreme Court decided a case defining new constitutional rights for students and another holding that if that right or any other constitu-

tional right were violated money damages could be recovered personally from elected local school officials.

Beginning in the middle 1970s, however, indications began to surface that the Supreme Court was shifting away from an emphasis on individual rights and towards a position more supportive of the right of elected officials to carry out policies and practices perceived to be in the best interest of the majority of voters. The first such indication in education occurred with the case of San Antonio v. Rodriguez,[12] when the Supreme Court in 1973 on a 5-4 vote held that it was not a violation of the Equal Protection Clause for the State of Texas to rely primarily upon the local property tax to finance schools even though such reliance led to wide fluctuations in the dollars available per student from school district to school district. In so doing, the Court held that education was not a "fundamental interest" under the federal Constitution. Thus, the Court not only foreclosed the federal Constitution as a basis for challenging school finance practices in the state but also called a halt to further expansion of individual rights in the schools under the banner of the Equal Protection Clause. It is really quite impossible to say what education would be like and how it would be financed if the Supreme Court in Rodriguez had decided the other way.

The unwillingness of the Supreme Court to identify new individual rights in education continued in 1977 in Ingraham v. Wright holding that students were not entitled to a due process hearing prior to the administration of corporal punishment.[13] In Ingraham, the Court also held that corporal punishment was not "cruel and unusual" under the Eighth Amendment to the Constitution. In 1978, the Court held in Horowitz v. University of Missouri that students were not entitled to a due process hearing prior to

an academic dismissal.[14] Ingraham and Horowitz together gave a strong signal that the Supreme Court was not inclined to expand procedural due process rights beyond the narrow disciplinary penalties outlined in Goss v. Lopez.

In 1981, the Court decided in Texas Department of Community Affairs v. Burdine that in a Title VII discrimination case the burden of proof falls squarely on the person alleging discrimination and that it is not the responsibility of the employer to prove absence of discriminatory intent.[15] Burdine makes it clear that while individuals have the right to be free of discrimination in employment decisions it is the responsibility of the individual to prove discrimination, not the responsibility of the employer to prove the absence of discrimination. This means that in cases where the evidence is inconclusive the decisions should be for the employer. The language of Burdine decision, contained in a unanimous opinion written by Associate Justice Lewis Powell, makes it very clear that compliance with Title VII requires that an employer have neutral personnel policies but does not require any preferential treatment whatsoever for women and minorities.

Another potentially serious blow to individual rights was dealt in the case of Board of Education v. Pico, the school library censorship case.[16] A school board on Long Island removed nine books from the school libraries without following the established procedure for reviewing library materials.[17] Several students in the school district filed suit alleging that the board's action infringed upon their First Amendment right to have access in the school library to a wide range of views on current social, political, and economic issues. The case found its way to the U. S. Supreme Court and provoked wide disagreement among the Justices. Although

almost every Justice wrote a separate opinion on this controversial case, it is reasonable clear that four of the Justices would have held that the removal of books from the school library violates the students' constitutional rights. Four other Justices would grant to local school officials almost unlimited discretion to determine the books appearing in school libraries. Justice Byron White, however, was unwilling to address the merits in this dispute and consequently the case will be sent back to the U. S. District Court for a trial. The importance of this case in the context of this analysis is that four Justices -- who probably represent the dominant ideological tone of the court in future years -- could find that there were no individual rights implicated by a school board decision to remove books from school libraries. It follows, therefore, that there are probably no individual rights involved when school officials select material for the library shelves or even for the school curriculum.

Another case suggestive of the emerging judicial support for elected school officials is Board of Education v. McCluskey.[18] In the fall of 1980, when Pete McCluskey was a high school sophomore in Rogers, Arkansas, he and some friends left school after the first period, did some drinking, and returned later in the day for a band trip. They were suspended and later had a hearing before the school board which affirmed the suspension. McCluskey sued alleging that he had been denied due process because the school board had unreasonable interpreted Rule 11 of the code of discipline which prohibited "being under the influence of any drug." The lower courts held that McCLuskey's suspension was illegal because although technically alcohol is a drug it is not commonly referred to as a drug. The U. S. Supreme Court on a five-four vote reversed the lower courts and held that the federal judiciary had no business whatsoever second-guessing local

school board officials on the interpretation of a local disciplinary rule. The importance of this decision is magnified because the Supreme Court issued its decision in a summary fashion without receiving briefs from the parties or hearing oral arguments.

Another case that can be cited as evidence of a trend away from individual rights in favor of the rights of local officials is not a school case but one which will have significant impact in the schools. The case, Connick v. Myers, involved an assistant district attorney in New Orleans who opposed a proposal by the district attorney to transfer her to a different section of the criminal court.[19] She distributed a questionnaire to the other assistant district attorneys in which she asked, among other things, about office morale, the need for a grievance committee, and whether there were any pressures to work in political campaigns. Myers was immediately terminated from her position. She challenged the termination in court, alleging that dismissal was caused by the exercise of constitutionally-protected speech. The Supreme Court in another 5-4 decision, upheld Myers' termination. The majority opinion, written by a Associate Justice Byron White, acknowledged that Myers had been fired because of the questionnaire and that at least one question touched upon a matter of public interest. Although this would have normally been enough to overrule Myers' termination, White decided that he needed to balance all of the circumstances in the situation before deciding the constitutional issue. He noted that the questionnaire was distributed largely in the context of a personal dispute between the district attorney and Myers, that Myers had used office time to prepare and distribute the questionnaire, and that she really hoped to precipitate a vote of no confidence in the district attorney. For these reasons, Myers' right to engage in constitutionally-

protected free speech activities was outweighted by the right of the employer to terminate disgruntled employees. This so-called balancing approach to termination cases involving the First Amendment activities substantially reduces the individual rights articulated fifteen years earlier in Pickering. The courts must apparently now judge such cases on a case-by-case rather than applying the rather clear principles emanating from Pickering.

Based on the events outlined above, it seems clear that we are now in the midst of a trend where the pendulum is swinging away from the emphasis on individual rights and back towards support for the authority of elected officials to carry out what they perceive to be the will of the majority of the voters in their jurisdictions. If indeed the pendulum is swinging in this direction, as this observer thinks it is, we in education are entering a very difficult period of adjustment. I don't want to suggest that conflicts between individuals and the schools are prevalent. Yet many of the individuals with whom we deal, such as students, employees, and parents, have their perceptions of individual rights firmly rooted in the legal concepts of the early 1970s. That is, many individuals will assume that when the rights of individuals come into conflict with the policies of elected officials that the individual rights supersede institutional authority. On the other hand, however, elected officials are becoming more attuned to the likelihood that the courts will support the institutions when a dispute over individual rights occurs.

Thus we may be in a period of the proverbial irresistible force and immovable object. This calls for great sensitivity, tolerance, and a spirit of good will and cooperation. If litigation is to be avoided during this period, elected and appointed officials have to be counseled against

misusing their new found support from the judiciary. It is incumbent upon educational administrators and lawyers working with school boards to make every effort to resolve disputes in an equitable way with due regard for the rights and interests of all parties. Even though we now believe that the courts will provide a more receptive forum for resolving disputes involving the schools, it would be unwise to push disputes into litigation at every opportunity.

If we in education have learned anything over the last several decades it is that litigation rarely results in solutions which are educationally sound. Therefore, it behooves us to conduct our affairs in a manner calculated to respect the rights of individuals while at the same time providing effective educational programs in the schools.

Footnotes

1/ Gerald Gunther and Noel T. Dowling, Constitutional Law: Cases and Materials, Seventh edition, 1970, p. 782.

2/ 347 U.S. 483 (1954. See Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality, 1975.

3/ 42 U.S. Code 2000.

4/ 391 U.S. 563 (1968).

5/ 393 U.S. 503 (1969).

6/ 20 U.S. Code 1681-82.

7/ 42 U.S. Code 2000.

8/ 20 U.S. Code 1405.

9/ 20 U.S. Code 1232g.

10/ 419 U.S. 565 (1975).

11/ 420 U.S. (1975).

12/ 401 U.S. 1 (1973).

13/ 430 U.S. 651 (1977).

14/ 435 U.S. 78 (1978.

15/ 101 S. Ct. 1089 (1981).

16/ 50 U.S. Law Week 4831 (June 25, 1982).

17/ The nine books were Slaughterhouse Five, by Kurt Vonnegut, Jr.; The Naked Ape, by Desmond Morris; Down These Mean Streets, by Piri Thomas; Best Short Stories of Negro Writers, edited by Langston Hughes; Go Ask Alice, of anonymous authorship; A Hero Ain't Nothin' but a Sandwich, by Alice Childress; Soul on Ice, by Eldridge Cleaver; The Fixer, by Bernard Malamud; and A Reader for Writers, edited by Jerome Archer.

18/ 50 U.S. Law Week 3998.25.

19/ 51 U.S. Law Week 4436 (April 20, 1983).